Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

TO: The Commission

SUPPLEMENT TO
PENDING MOTION FOR STAY

Daniels Cablevision, Inc. ("Daniels") hereby supplements its "motion for stay," as initially filed in the captioned proceeding June 9, 1993 and which has never been acted upon by the Commission.

Daniels generally supports the motions for stay recently filed in this proceeding on behalf of InterMedia Partners, L.P., CATA and others. Unlike other movants, Daniels emphasizes the constitutional deficiencies inherent in, and fatal to, the processes adopted in this docket proceeding. On this day, Daniels filed comments with the Office of Management and Budget relevant to that agency's review of FCC Form 393. A copy of these comments is attached, incorporated here and into the pending stay motion.

It is Daniels' contention that Form 393, including the processes underlying and contemplated by the reporting

obligation, facially conflict with the protections and freedoms guaranteed by the First Amendment.

Respectfully submitted,

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operators are required to materially revise their accounting practices to conform to the new policies and reporting requirements, thereby imposing further and substantial new costs on

compelling-interest argument in support of its regulatory scheme, the agency, in 500 pages of Report and Order, stands mute regarding any First Amendment implications. Where a regulation specially and selectively burdens expressive activity, thereby unquestionably implicating the First Amendment, the silence of the FCC is fatal to promulgation of the Form and its underlying policies. One may only assume that the FCC is not conscious of its transgression of the constitutional command. Or, is OMB, contrary to reality, common sense and legions of precedent, simply to assume that the subject Form and all that it comprehends constitute appropriate governmental action under the Constitution?

Moreover, the form and its underlying FCC Report and Order are not understandable. As the Federal Register notice points out, the suggested form is in a process of continuous revision in an effort to bring clarity to the present chaos. The effort, however intense or genuine, cannot succeed.

The fundamental, and constitutionally disqualifying, defect in FCC Form 393 is that it facially conflicts with the First Amendment to the U.S. Constitution. See Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 793-94 (1988). The identical deficiencies unlawfully imposed by the State of North Carolina in Riley (and far more) are present in the "benchmark" scheme advanced by the FCC. As in Riley, "the burden is placed on the [cable operator] to rebut the presumption advanced by the ordained benchmark rate. Id. at 793. As in Riley, the First Amendment simply does not countenance "a measure that requires the speaker to prove 'reasonableness' case by case based upon what is at best a lose inference that the [cable subscription] fee might be too high." Id. As in Riley, the FCC scheme comprehends a "factfinder [either local or federal officials], who may still decide that the cost incurred or the [cable operator's] profit were excessive." Id. As in Riley, cable operators too are "faced with the knowledge that [their charges] in excess of [the benchmark rate] will subject them to potential litigation over the 'reasonableness' of the fee." Id. at 794. As in Riley, it is the cable operator that "must bear the cost of

Riley, "the burden is placed on the [cable operator] . . . to rebut the presumption of unreasonableness." Id. at 793. Any presumption, of course, must militate for speech and communicative distribution free of governmental restriction or burdens. The FCC's benchmark process unlawfully inverts the constitutionally mandated priority.

The FCC's benchmark scheme closely parallels, but is far worse in a First Amendment context than, the scheme under review in Riley, because the North Carolina law was aimed at professional fundraisers while the FCC targets the press, thus compounding the constitutional infirmity. When government "claims the power to establish a single transcendent criterion by which it can bind the [cable operator's] speaking decisions" (e.g., benchmark rates), and justifies that benchmark determination by an "almost talismanic reliance on the mere assertion [that it] is simply an economic regulation with no First Amendment implication, its action "stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums." Id. at 790. See also id. at 788-789. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Id. at 801. Under any circumstances, the FCC's regulatory scheme is minimally "subject to exacting First Amendment scrutiny." Id. at 798. Yet, the Government stands curiously silent. The "First Amendment does not permit [the government] to sacrifice speech for efficiency." Id. at 795. And yet, the whole justification for the benchmark scheme is the Government's convenience.

"'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.'" Id. at 791 (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945)(Jackson, J., concurring)). It hardly takes a rocket scientist to conclude that a federal form targeting one component of the press and required to be completed as a precondition to the distribution of mass-media communications -- even if such task consumes "only" the FCC's self-serving estimate of 40 hours -- constitutes, at best, a "burden" on the conduct of activity protected by the First Amendment. Simon & Schuster v. N.Y. State Crime Victims Bd., 112 S.Ct. 501, 508-09 (1991). When it is understood that completion of Form 393 represents only a small portion of that speech-related burden, the constitutional infraction is manifest. That the FCC would promulgate such a restraint without attempting to justify, or even recognizing, the First Amendment implications inherent in its action, is a default. Clearly, OMB cannot realistically be expected to ignore the con-

If a tax selectively applied to the press is at odds with the First Amendment, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), then comprehensive rate regulations that narrowly target and facially restrain the distribution practices of one element of the press are, a fortiori, unconstitutional. A tax, at very least, starts out on the right foot, U.S. Const. Art. I, sec. 8, Cl. 1 ("The Congress shall have Power To lay and collect Taxes"), while a law targeting the press and deliberately restraining communicative activity runs smack into the First Amendment's command ("Congress shall make no law . . . abridging the freedom of speech, or of the press").

Were the Form in question to be thrust upon newspaper publishers, or indeed any other editors or purveyors of mass-media communications, as a condition precedent to conduct of their communicative functions, it would forthwith be declared a facially unconstitutional prior restraint on speech and press in violation of the First Amendment. See, e.g., City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-761 (1988). Cable operators, like "[n]ewspapers are engaged in the business of expression," and that fact constitutionally renders the regulation of their business materially different from those whose primary business is not "expression." Id. at 761. Thus, while a power or telephone utility, for example, may be rate-regulated, the press may not. Id. See also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120 (1973)(recognizing a "basic distinction" between regulation of the communications media and a "utility that itself derives no protection from the First Amendment"); 47 U.S.C. § 541(c) ("any cable system shall not be subject to regulation as a common carrier or utility"). Nonetheless, the Form under review imposes, or is the precursor to, the most vigorous, utility-like regulation on the cable press. What the FCC unquestionably has done, without any consideration of the obvious constitutional implications, is to apply, in toto, its expertise in the rate regulation of telephone carriers to the distribution of mass media communications via cable television lines. In the process, it injects itself into the management and welfare of cable operations, ignoring the protections afforded speech and press under the First Amendment.

The devastating impact of this form on small cable television operators, alone, is reason to reject the FCC's creation. When that impact is considered in the further context of the unconstitutional nature and intended usage of Form 393, the FCC's creation is beyond salvage.

Accordingly, FCC Form 393, the facial purpose and effect of which is to restrain freedoms guaranteed by the First

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, a secretary with the law firm of Cole, Raywid & Braverman, do hereby certify that copies of the foregoing "Supplement to Pending Motion for Stay" were sent via first-class, postage prepaid, United States mail, this 30th day of July, 1993, to the following:

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